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No. 94-1039

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, As Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKFEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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This brief *amicus curiae* of The American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") in support of the Respondents is filed with the written consent of the parties as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

AFSCME is a labor union with approximately 1.3 million members, most of whom are employees of state or local governments. AFSCME represents more than

three thousand individuals who are employed by state, county or municipal governments in the State of Colorado. Amendment 2 could directly affect these individuals as well as AFSCME.

SUMMARY OF ARGUMENT

At issue is whether the citizens of Colorado can amend the state constitution to prevent the concerns of gays, lesbians and bisexuals over discrimination in the workplace, housing and public accommodations from being addressed at any level of state government, at least until Amendment 2 is repealed. This constitutional amendment, approved by the electorate in November 1992, prohibits all branches of Colorado state and local government from passing or enforcing any law, resolution or policy that protects individuals from discrimination based upon their sexual orientation. The Colorado Supreme Court held that Amendment 2 violated the equal protection clause contained in the Fourteenth Amendment to the United States Constitution because it infringed upon the fundamental right of gays, lesbians and bisexuals to participate equally in the political process. In reaching this conclusion, the Colorado Supreme Court relied on this Court's decisions striking down state statutory and constitutional restrictions on the right to vote, on apportionment and reapportionment, on access to the ballot, and on candidate eligibility.

Petitioners contend that the Colorado Supreme Court was mistaken in relying on those cases, in part because the decisions do not enunciate a fundamental right to participate in the political process and in part because Amendment 2 works no deprivation of rights of constitutional proportion. Petitioners argue that Amendment 2 produces only an inconsequential deprivation of rights because gays, lesbians and bisexuals are still free to participate in the political process on issues unrelated to discrimination at all levels of government and on issues

related to discrimination through advocating a constitutional referendum to repeal Amendment 2.

While we believe that neither of Petitioners' contentions have merit, we limit our argument in this brief to Petitioners' second claim, that a partial deprivation is not of constitutional significance, because it is so contrary to AFSCME's experience. The ability of public employees to insure that decisions regarding their hiring, promotion, discipline and discharge will be based upon their workplace performance and not personal preference or prejudice is principally determined through bargaining, lobbying and political activism at the state and local levels of government. Amendment 2 singles out gays, lesbians and bisexuals and deprives them of the right to pursue their workplace concerns on an equal basis with all other Colorado public employees.

Discrimination against gays and lesbians has occurred in public employment in Colorado in the past and it can reasonably be expected to occur again in the future. If Amendment 2 becomes law, AFSCME will be unable to negotiate provisions into its collective bargaining agreements that limit discrimination based on sexual orientation. Similarly, the union will be unable to enforce existing grievance and arbitration procedures on behalf of gay, lesbian and bisexual members who are subject to discrimination, discipline or discharge because of their sexual orientation. As a practical matter, these contractual protections are meaningful only if they can be enforced in the administrative and judicial forums of local and state government. No one can reasonably expect a qualified candidate for promotion who is passed over because of his or her sexual orientation to obtain a remedy through a ballot initiative repealing Amendment 2. The loss of the right to participate fully in these political forums and the accompanying loss of workplace rights will erode the structure of fairness that should underlie the personnel decisions of public employers in the State of Colorado.

Nor, upon examination, does the case law support Petitioners' claim that Amendment 2 will work no significant deprivation of rights. Most of the cases the Colorado Supreme Court cited in support of its holding involve only a "partial" deprivation of the right to participate in the political process, much as in the case before this Court. In fact, the deprivation here is substantial and there is no constitutionally sound basis upon which to exile an independently identifiable group from such a significant part of the political process.

Petitioners' claim that Amendment 2 does little more than "withdraw a deeply divisive social and political issue from elected representatives and place its resolution squarely in the hands of the people" is a fallacy. Petitioners' Brief at 10. Amendment 2 hobbles the ability of gays, lesbians and bisexuals to effectively participate in the administrative and political mechanisms that are used most frequently by all citizens to achieve an orderly resolution of competing claims. This will not calm the political waters as the State would have us believe. Indeed, Petitioners do not even claim that Amendment 2 will bring a *resolution* to what they refer to as a deeply divisive social and political issue. Instead, the competing interests will continue to fight over their views. The only change will be that these struggles will no longer occur in the political forums our society has created for that end.

ARGUMENT

I.

Amendment 2 prohibits all branches of Colorado state and local government from passing or enforcing any law, regulation or policy that limits the right to discriminate against another because they are gay, lesbian or bisexual. Amendment 2 will supersede existing legal protections for gays, lesbians and bisexuals and prevent them from seeking similar protection in the future unless they first repeal this state constitutional amendment. The case law supports the conclusion that this is a constitutionally significant deprivation of rights, regardless of the "issue specific" nature of the deprivation and the fact that gays, lesbians and bisexuals retain the right to sponsor a constitutional ballot initiative to repeal Amendment 2.

The Colorado Supreme Court held that Amendment 2 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and affirmed the trial court's permanent injunction. *Romer v. Evans*, 854 P.2d 1270 (1993), *reaffirmed at* 882 P.2d 1335 (1994). In a 6-1 decision, the state court held that many of this Court's decisions articulate a fundamental right to political participation, and that strict scrutiny would be applied to any effort to restrict an independently identifiable group's right to participate equally in the political process. 854 P.2d at 1276. The state supreme court emphasized that this heightened protection is necessary to insure that all interests in society, including those of minorities, are guaranteed the right to participate effectively (as distinguished from successfully) in the process of government. In reaching that conclusion, the Colorado Supreme Court relied on decisions of this Court striking down limitations or preconditions on voting, on apportionment and reapportionment, on ballot access and on candidate eligibility.

Petitioners argue that the Colorado Supreme Court was in error, both because this Court has never articulated a

fundamental right to participate in the political process, and even if it had, Amendment 2 does not rise to the level of a constitutional deprivation. Petitioners' Brief at 18 & 25. In support of these arguments, they note that the group singled out in Amendment 2 retains the right to vote, the right to participate in state and local politics (at least to the degree the subject matter of their advocacy does not cross Amendment 2's limitations), and the right to seek protection from discrimination for gays, lesbians and bisexuals through a ballot initiative to repeal Amendment 2. Petitioners' Brief at 11-12. While neither of these arguments has merit, AFSCME's experience most strongly speaks to the error of the latter claim.

This Court has consistently held that the presence of an alternative, admittedly more difficult, forum will not save a statute that denies citizens the right to participate equally in the political process. This Court has struck down barriers to effective political participation in voting rights cases, in reapportionment cases, in ballot access cases and in candidate eligibility cases.[1] Nor does the case law support Petitioners' notion that it is of no concern (at least no concern of constitutional proportion) if a group is deprived of the right to participate in the political process, so long as it can return to the arena in which it has lost, to play the game again. Petitioners' Brief at 27.

In *Kramer v. Union Free School District*, 395 U.S. 621 (1969), this Court rejected an argument now advanced by Petitioners: depriving a group of the right to raise an issue in a particular forum is of no constitutional importance if there is another, more difficult forum in which it could participate.[2] The New York legislature had

[1] To the degree these cases are viewed as "fundamental rights" cases and "suspect class" cases, Petitioners' arguments have been rejected in both categories.

[2] In fact, we believe that Petitioners' argument conflicts with the entire method by which cases are categorized in this area of the law. By their very nature, the reapportionment cases address only a dilution of the right to vote and the participation cases involve the denial of the franchise in a limited context. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 568 (1964) and *Kramer v. Union Free School District*, 395 U.S. at 626 (emphasizing this distinction). In all of these cases, a violation of the equal protection clause was found, despite the fact that the disadvantaged group retained the right to participate in some more limited forum.

passed a statute that allowed for popularly elected school boards to administer primary and secondary education. The statute prohibited individuals from voting in school board elections unless they were property holders, citizens of the United States and at least 21 years of age. *Id.* at 632-33. Under Petitioners' analysis, these restrictions would amount to no more than the "division of authority . . . between state and local governing bodies" and a limited deprivation of rights on only certain issues. Petitioners' Brief at 3, 14 and 27. Certainly Justice Stewart, writing for the dissent in *Kramer*, believed this to be the case. Justice Stewart noted that Kramer retained the right to vote in New York State elections and to lobby to repeal the statute that limited his right to participate in school board elections. *Id.* at 639-40.

A majority of the *Kramer* Court took a quite different view. Justice Warren, writing for the majority, emphasized that caution is needed when statutes grant the franchise on a selective basis, for fear this will deny some citizens "any effective voice in the governmental affairs which substantially affect their lives." 395 U.S. at 627. The unconstitutional restriction on Kramer's right to vote was not diminished by the fact that the restriction was limited to the issue of school administration, nor by the fact that he retained the right to vote for state legislators who could restructure the political system to repair that deprivation. *Id.* at 621.

Similarly, when a ballot initiative in Washington State amended the state constitution to strip school boards of the power to order busing to achieve racial integration,

this Court held there was a violation of equal protection, despite the fact that minorities retained the right to lobby school boards on other issues and could have used the initiative process to repeal the offending amendment. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). This Court found that creating procedural barriers to the political process could unfairly burden rights, even when the deprivation was not complete. The majority opinion states that by transferring decisionmaking on busing from the local school boards to constitutional ballot initiatives, political participation was removed to a "new and remote level of government".[3] *Id.* at 483.

In fact, only rarely has this Court addressed a case where there has been a complete deprivation of the right to participate in the political process. In almost every instance, this Court has wrestled with impediments to participation. Frequently, these cases involve a minority of citizens who were deprived of the right to participate on only a single issue. In *Reitman v. Mulkey*, 387 U.S. 369, 377-78 (1967), a ballot initiative amended the state constitution to prohibit state or local governments from restricting housing discrimination. Petitioners would cast this as a simple restructuring of the state government to prevent state and local elected officials from legislating on a controversial social and political issue. Instead, this Court found it to be a violation of the equal protection clause. *See also, Hunter v. Erickson*, 393 U.S. 385 (1969) and *Reynolds v. Sims*, 377 U.S. 533 (1964). In *Hunter* and *Reynolds*, this Court found a violation of

[3] This decision should put to rest the notion that a deprivation of rights under the equal protection clause is not reviewable if it is clothed as a restructuring of state powers. "In our view, Initiative 350 must fall because it does 'not attemp[t] to allocate governmental power on the basis of any general principle.' *Hunter v. Erickson*, 393 U.S., at 395 (Harlan, J., concurring). Instead it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Washington v. Seattle Schools*, 458 U.S. at 470.

the equal protection clause, even though the citizens—like the gay, lesbian and bisexual residents in Colorado—retained the right to advance a ballot initiative to repeal the offending provision in the state constitution. The presence of an alternative means of participation does not excuse the creation of structural impediments to participation.

Petitioners cite *Crawford v. Board of Education*, 458 U.S. 527 (1982), as dispositive of this case. Petitioners' Brief at 33. Yet they appear to misunderstand *Crawford* and how this Court distingiushed it from *Washington v. Seattle Schools*, which was argued and decided on the same day. 458 U.S. 457 & 527. Under the state constitutional amendment reviewed in *Crawford*, citizens retained the right to lobby for and pass legislation at the local level to end desegregation. The constitutional amendment in *Crawford* simply prevented California courts from interpreting the equal protection clause in the state constitution more broadly than they would interpret the equal protection clause in the U.S. Constitution. Justice Powell cited this as the central distinguishing feature between *Crawford* and *Seattle Schools*, because it preserved the right of citizens to participate equally in the political process on this issue at the state and local level. *Crawford*, 458 U.S. at 536, fn. 12. Thus, it was the continued presence of a right to participate fully in the political process that this Court cited in distinguishing permissible and impermissible burdens on political participation in *Crawford*, and not Petitioners' notion that a State may freely take away those rights it has earlier given.[4]

Similarly, in citing *James v. Valtierra*, 402 U.S. 137 (1971), Petitioners ask this decision to do more than

[4] Petitioners' theory that a State can unequally allocate the right to participate in a political forum if it has the power to revoke all citizens' right to participate in the forum was also rejected by this Court in *Kramer v. Union Free School District*, 395 U.S. at 629. There, the fact that school boards could be appointed rather than elected did not justify restricting the right to vote to property owners.

it is able. The statute under review in *James* placed a burden on a minority of the voters—those seeking public housing—because approval of additional public housing was conditioned upon a referendum vote in the county, town or city where the housing would be located. *Id.* 402 U.S. at 139. However, this Court found the requirement of a local referendum on this issue did not fence out any independently identifiable groups from political participation. In contrast, Amendment 2 will remove precisely the sort of community control and community political process that was upheld in *James*.

In short, to require that a group of citizens pursue its political interests only through a state constitutional amendment is a deprivation of rights of constitutional proportion. There is simply no merit to the claim that such a deprivation is minor, inconsequential or immune from review when framed as an ordering of the operation of state government.

II.

Amendment 2 will work a significant and substantial deprivation of rights in the employment context. The fair and efficient delivery of public services is centered on the principle that employees will be judged in hiring, transfer, promotion, discipline and discharge on their conduct in the workplace, and not upon personal traits, off-duty conduct, friendships, familial ties or other characteristics that are not work-related. Most frequently, these principles are established and enforced at a state or local level.

These principles are embodied in statutes, ordinances, regulations and union contracts. These legislative and contractual provisions give citizens a means of enforcing these principles against countervailing forces of arbitrariness, prejudice and self-interest. These protections appear as an affirmative pledge, frequently in the context of a

merit system adopted by a state or local government.[5] In union contracts, these principles sometimes appear in clauses that limit an employer's right to discipline and discharge employees to those situations where there is just cause to support such severe sanctions. In other circumstances they may require the employer to make promotional decisions or work assignments based on qualifications and/or seniority. These principles are also embodied in statutes, ordinances, executive orders and union contracts in the form of prohibitions on discrimination on the basis of sexual orientation.[6]

One of AFSCME's goals is to ensure that all workers are treated with fairness and dignity in the workplace. AFSCME's affiliates routinely bargain for contractual provisions tailored to the specific concerns or needs of our members at a particular worksite. These include anti-discrimination provisions to insure that individuals are not singled out for mistreatment due to non-job related characteristics, including sexual orientation, disabilities, or religious concerns. All of these provisions are the result of an orderly process of resolving workplace conflicts.

Amendment 2 will nullify these provisions by limiting access to or negating the mechanisms that create or enforce these rights. Without access to the union grievance procedure, internal administrative dispute resolution systems and ultimately the courts, there is no legitimate forum for these workplace disputes. It does not mean that the disputes go away, or that the concerns of gays, lesbians or bisexuals disappear. It simply means that the

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[5] *See, e.g.*, Colo. Rev. Stat. § 24-34-402.5 (unfair employment practice to terminate employment due to off premises lawful conduct.)

[6] *See, e.g.*, Executive Order No. D0035, December 10, 1990; Code of Colorado Regulations, 4 CCR 801-1, policy 11-1; Denver Mun. Code Art. IV, §§ 28-91 to 28-116 (1991); Aspen Mun. Code § 13-98; and Boulder Rev. Code §§ 12-1-2 to 12-1-4.

orderly mechanisms the state has created to resolve these disputes will be unavailable.

It is no answer to individuals who have been discharged because of their sexual orientation, rather than their work performance, to tell them they can seek a state ballot initiative to repeal Amendment 2 to remedy their discharge. For employees passed over for promotion or given a suspension rather than a reprimand because they are gay, lesbian, or bisexual, the chief remedy exists at the local level, as it does for all employees. The concerns of these employees for fairness will have no forum if Amendment 2 becomes the law of Colorado. The end result will be that able employees will be subject to irrational treatment and the effectiveness of the work force will suffer.

CONCLUSION

For the foregoing reasons, the decision and judgment of the Colorado Supreme Court in this case should be affirmed.

Respectfully submitted,

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